

# **EXHIBIT 1**

**From:** [Moran, David](#)  
**To:** [MCCALLUM, Robert](#); [Zeke DeRose III](#); [Michael Davis](#); [geraldine.young@nortonrosefulbright.com](#)  
**Cc:** [Mark Lanier](#); [ack@kellerpostman.com](#); [marc.collier@nortonrosefulbright.com](#); [MAHR, Eric \(EJM\)](#); [SESSIONS, Justina \(JKS\)](#); [EWALT, Andrew \(AJE\)](#); [RYBNICEK, Jan \(JRYB\)](#); [ELMER, Julie \(JSE\)](#); [Alex J. Brown](#); [Marc B. Collier](#); [KLEIN, Gayle \(GRK\)](#); [FORKNER, Constance](#); [GARRETT, Tyler](#); [BOSCO, Veronica](#); [SONG, Tinny](#); [Kathy Patrick](#); [Charles M. Rosson](#); [Robin C. Gibbs](#); [Ann Lebeck](#); [Caitlin Halpern](#); [Michael Doman](#); [Daniel Bitton](#); [Bradley Justus](#); [dpearl@axinn.com](#); [rsteinthal@axinn.com](#); [jhunsberger@axinn.com](#); [Freeborn, Andrew L.](#); [Alex Abston](#); [John McBride](#); [Jonathan Wilkerson](#); [Murtha, Michael](#)  
**Subject:** RE: Rescheduling Baye Deposition  
**Date:** Friday, September 20, 2024 11:44:40 AM

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**External Sender**

Counsel:

Thank you for copying me on your recent discussions.

I have spoken with Judge Jordan.

It appears that Google intends to file a motion to strike today.

Assuming Google files its motion to strike, Google should also file a short motion requesting that the motion to strike be decided by Judge Jordan, rather than the Special Master. The proposed briefing schedule on the strike motion, as mentioned below in the emails, should be addressed.

Google also should indicate of course whether the motion for Judge Jordan to decide the strike motion is unopposed.

I would anticipate Judge Jordan will give prompt attention to these filings.

Thank you.

David

**David T. Moran**

Jackson Walker LLP

2323 Ross Avenue, Suite 600

Dallas, TX. 75201

V: (214) 953-6051

[dmoran@jw.com](mailto:dmoran@jw.com)

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**From:** MCCALLUM, Robert <rob.mccallum@freshfields.com>

**Sent:** Thursday, September 19, 2024 10:35 PM

**To:** Zeke DeRose III <Zeke.DeRose@LanierLawFirm.com>; Michael Davis <mdavis@gibbsbruns.com>; geraldine.young@nortonrosefulbright.com

**Cc:** Mark Lanier <Mark.Lanier@LanierLawFirm.com>; ack@kellerpostman.com; marc.collier@nortonrosefulbright.com; MAHR, Eric (EJM) <Eric.MAHR@freshfields.com>; SESSIONS, Justina (JKS) <Justina.Sessions@freshfields.com>; EWALT, Andrew (AJE) <Andrew.Ewalt@freshfields.com>; RYBNICEK, Jan (JRYB) <Jan.RYBNICEK@freshfields.com>; ELMER, Julie (JSE) <Julie.Elmer@freshfields.com>; Alex J. Brown <Alex.Brown@LanierLawFirm.com>; Marc B. Collier <marc.collier@nortonrosefulbright.com>; KLEIN, Gayle (GRK) <Gayle.Klein@freshfields.com>; FORKNER, Constance <Constance.Forkner@freshfields.com>; GARRETT, Tyler <Tyler.Garrett@freshfields.com>; BOSCO, Veronica <Veronica.Bosco@freshfields.com>; SONG, Tinny <Tinny.Song@freshfields.com>; Kathy Patrick <kpatrick@gibbsbruns.com>; Charles M. Rosson <CRosson@gibbsbruns.com>; Robin C. Gibbs <rgibbs@gibbsbruns.com>; Ann Lebeck <alebeck@gibbsbruns.com>; Caitlin Halpern <chalpern@gibbsbruns.com>; Michael Doman <mdoman@gibbsbruns.com>; Daniel Bitton <dbitton@axinn.com>; Bradley Justus <bjustus@axinn.com>; dpearl@axinn.com; rsteinthal@axinn.com; jhunsberger@axinn.com; Freeborn, Andrew L. <afreeborn@axinn.com>; Alex Abston <Alex.Abston@LanierLawFirm.com>; John McBride <john.mcbride@nortonrosefulbright.com>; Jonathan Wilkerson <Jonathan.Wilkerson@LanierLawFirm.com>; Murtha, Michael <mmurtha@jw.com>; Moran, David <dmoran@jw.com>

**Subject:** RE: Rescheduling Baye Deposition

**Caution: \*\*External Email.**

Zeke:

Thanks for getting back to us on some of the issues raised in my email of last night, and for the call earlier this evening.

Your email does not address two issues on which we urgently need Plaintiffs' position. First, please confirm whether Plaintiffs agree to, or oppose, our request for leave for Prof. Baye to serve a sur-rebuttal. Second, we proposed that Plaintiffs will take Prof. Baye's deposition on October 25, October 31, or November 1. Please confirm whether you will agree to one of those dates (and, if so, which one).

In addition, in my email of last night we proposed new dates for Gans and Wiggins to accommodate resolution of the motion to strike by the Court. We understand your position to be that, if Google files a motion to strike, Plaintiffs will not agree to move any deposition dates. If you adhere to that position, please note that Google will object to any subsequent attempt by Plaintiffs to reopen any deposition of Google's experts. If you are willing to reconsider that position, or to otherwise work together on a way to accommodate our different views on the motion to strike without missing deadlines or unnecessarily risking reopening depositions of the same witness, please let us know as soon as possible tomorrow.

As discussed in our call this evening, we will put you down as opposed to the motion to strike. While we don't mean to debate this here, we note that we are unaware of any practice or guidance suggesting that motions to strike improper/untimely expert opinions—as opposed, say, to Daubert motions—are to be filed after the depositions of the relevant expert(s), as that would at least in part defeat the purpose of the motion to strike.

Finally, as discussed this evening, the motion and exhibits will necessarily implicate confidential and highly confidential information drawn from expert reports. I understand that Plaintiffs are generally amenable to our filing the motion to strike and expert-report exhibits under seal, but it would be great if you could confirm in the morning that we can put Plaintiffs down as unopposed to the sealing motion.

We are available to meet and confer and can jump on a call in the morning if that would be helpful.

Kind regards,  
Rob

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**From:** Zeke DeRose III <[Zeke.DeRose@LanierLawFirm.com](mailto:Zeke.DeRose@LanierLawFirm.com)>

**Sent:** Thursday, September 19, 2024 6:34 PM

**To:** MCCALLUM, Robert <[rob.mccallum@freshfields.com](mailto:rob.mccallum@freshfields.com)>; Michael Davis <[mdavis@gibbsbruns.com](mailto:mdavis@gibbsbruns.com)>; [geraldine.young@nortonrosefulbright.com](mailto:geraldine.young@nortonrosefulbright.com)

**Cc:** Mark Lanier <[Mark.Lanier@LanierLawFirm.com](mailto:Mark.Lanier@LanierLawFirm.com)>; [ack@kellerpostman.com](mailto:ack@kellerpostman.com); [marc.collier@nortonrosefulbright.com](mailto:marc.collier@nortonrosefulbright.com); MAHR, Eric (EJM) <[Eric.MAHR@freshfields.com](mailto:Eric.MAHR@freshfields.com)>; SESSIONS, Justina (JKS) <[Justina.Sessions@freshfields.com](mailto:Justina.Sessions@freshfields.com)>; EWALT, Andrew (AJE) <[Andrew.Ewalt@freshfields.com](mailto:Andrew.Ewalt@freshfields.com)>; RYBNICEK, Jan (JRYB) <[Jan.RYBNICEK@freshfields.com](mailto:Jan.RYBNICEK@freshfields.com)>; ELMER, Julie (JSE) <[Julie.Elmer@freshfields.com](mailto:Julie.Elmer@freshfields.com)>; Alex J. Brown <[Alex.Brown@LanierLawFirm.com](mailto:Alex.Brown@LanierLawFirm.com)>; Marc B. Collier <[marc.collier@nortonrosefulbright.com](mailto:marc.collier@nortonrosefulbright.com)>; KLEIN, Gayle (GRK) <[Gayle.Klein@freshfields.com](mailto:Gayle.Klein@freshfields.com)>; FORKNER, Constance <[Constance.Forkner@freshfields.com](mailto:Constance.Forkner@freshfields.com)>; GARRETT, Tyler <[Tyler.Garrett@freshfields.com](mailto:Tyler.Garrett@freshfields.com)>; BOSCO, Veronica <[Veronica.Bosco@freshfields.com](mailto:Veronica.Bosco@freshfields.com)>; SONG, Tinny <[Tinny.Song@freshfields.com](mailto:Tinny.Song@freshfields.com)>; Kathy Patrick <[kpatrick@gibbsbruns.com](mailto:kpatrick@gibbsbruns.com)>; Charles M. Rosson <[CRosson@gibbsbruns.com](mailto:CRosson@gibbsbruns.com)>; Robin C. Gibbs <[rgibbs@gibbsbruns.com](mailto:rgibbs@gibbsbruns.com)>; Ann Lebeck <[alebeck@gibbsbruns.com](mailto:alebeck@gibbsbruns.com)>; Caitlin Halpern <[chalpern@gibbsbruns.com](mailto:chalpern@gibbsbruns.com)>; Michael Doman <[mdoman@gibbsbruns.com](mailto:mdoman@gibbsbruns.com)>; Daniel Bitton <[dbitton@axinn.com](mailto:dbitton@axinn.com)>; Bradley Justus <[bjustus@axinn.com](mailto:bjustus@axinn.com)>; [dpearl@axinn.com](mailto:dpearl@axinn.com); [rsteinthal@axinn.com](mailto:rsteinthal@axinn.com); [jhunsberger@axinn.com](mailto:jhunsberger@axinn.com); Freeborn, Andrew L. <[afreeborn@axinn.com](mailto:afreeborn@axinn.com)>; Alex Abston <[Alex.Abston@LanierLawFirm.com](mailto:Alex.Abston@LanierLawFirm.com)>; John McBride <[john.mcbride@nortonrosefulbright.com](mailto:john.mcbride@nortonrosefulbright.com)>; Jonathan Wilkerson <[Jonathan.Wilkerson@LanierLawFirm.com](mailto:Jonathan.Wilkerson@LanierLawFirm.com)>; [mmurtha@jw.com](mailto:mmurtha@jw.com); Moran, David <[dmoran@jw.com](mailto:dmoran@jw.com)>  
**Subject:** Re: Rescheduling Baye Deposition

Rob,

Thank you for your email.

I will note that Google had copies of all the reports it now threatens to seek to strike when it met, conferred, and reiterated its agreement (e.g., on 9/13

and 9/15) to our existing deposition schedule.

Plaintiff States do not agree that any of their reports are improper rebuttal under applicable law and stand ready to respond promptly to any motion to strike. We believe the practice in the Eastern District of Texas is to file motions to strike after the reports are in and depositions taken so the Court can rule on a full record and can agree Google does not waive any objections to filing by the normal deadline.

That said, if Google chooses to file a premature motion to strike, this briefing (or any appeals) should not delay either (i) the depositions or (ii) any sur-rebuttal expert reports that Google believes it is entitled to serve. In any event, pursuant to Judge Jordan's Order, this discovery dispute should go to the Special Master in the first instance and comply with the existing briefing restrictions with no delay in the existing deposition schedule.

We have copied Special Master on this thread to facilitate any conversation that may be necessary regarding Judge Jordan's schedule, the schedule the parties have negotiated regarding discovery and briefing, and best next steps should input from the Special Master be necessary.

Zeke

Zeke DeRose III - Attorney p: 713-659-5200 w: [www.LanierLawFirm.com](http://www.LanierLawFirm.com)

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**From:** "MCCALLUM, Robert" <[rob.mccallum@freshfields.com](mailto:rob.mccallum@freshfields.com)>

**Date:** Wednesday, September 18, 2024 at 7:58 PM

**To:** Michael Davis <[mdavis@gibbsbruns.com](mailto:mdavis@gibbsbruns.com)>, "geraldine.young@nortonrosefulbright.com" <[geraldine.young@nortonrosefulbright.com](mailto:geraldine.young@nortonrosefulbright.com)>

**Cc:** Zeke DeRose III <[Zeke.DeRose@LanierLawFirm.com](mailto:Zeke.DeRose@LanierLawFirm.com)>, Mark Lanier <[Mark.Lanier@LanierLawFirm.com](mailto:Mark.Lanier@LanierLawFirm.com)>, Ashley Keller <[ack@kellerpostman.com](mailto:ack@kellerpostman.com)>, "marc.collier@nortonrosefulbright.com" <[marc.collier@nortonrosefulbright.com](mailto:marc.collier@nortonrosefulbright.com)>, "MAHR, Eric (EJM)" <[Eric.MAHR@freshfields.com](mailto:Eric.MAHR@freshfields.com)>, "SESSIONS, Justina (JKS)" <[Justina.Sessions@freshfields.com](mailto:Justina.Sessions@freshfields.com)>, "EWALT, Andrew (AJE)" <[Andrew.Ewalt@freshfields.com](mailto:Andrew.Ewalt@freshfields.com)>, "RYBNICEK, Jan (JRYB)" <[Jan.RYBNICEK@freshfields.com](mailto:Jan.RYBNICEK@freshfields.com)>, "ELMER, Julie (JSE)" <[Julie.Elmer@freshfields.com](mailto:Julie.Elmer@freshfields.com)>, "KLEIN, Gayle (GRK)" <[Gayle.Klein@freshfields.com](mailto:Gayle.Klein@freshfields.com)>, "FORKNER, Constance" <[Constance.Forkner@freshfields.com](mailto:Constance.Forkner@freshfields.com)>, "GARRETT, Tyler" <[Tyler.Garrett@freshfields.com](mailto:Tyler.Garrett@freshfields.com)>, "BOSCO, Veronica" <[Veronica.Bosco@freshfields.com](mailto:Veronica.Bosco@freshfields.com)>, "SONG, Tinny"

<[Tinny.Song@freshfields.com](mailto:Tinny.Song@freshfields.com)>, Kathy Patrick <[kpatrick@gibbsbruns.com](mailto:kpatrick@gibbsbruns.com)>, "Charles M. Rosson" <[CRosson@gibbsbruns.com](mailto:CRosson@gibbsbruns.com)>, "Robin C. Gibbs" <[rgibbs@gibbsbruns.com](mailto:rgibbs@gibbsbruns.com)>, Ann Lebeck <[alebeck@gibbsbruns.com](mailto:alebeck@gibbsbruns.com)>, Caitlin Halpern <[chalpern@gibbsbruns.com](mailto:chalpern@gibbsbruns.com)>, Michael Doman <[mdoman@gibbsbruns.com](mailto:mdoman@gibbsbruns.com)>, Daniel Bitton <[dbitton@axinn.com](mailto:dbitton@axinn.com)>, Bradley Justus <[bjustus@axinn.com](mailto:bjustus@axinn.com)>, "[dpearl@axinn.com](mailto:dpearl@axinn.com)" <[dpearl@axinn.com](mailto:dpearl@axinn.com)>, "[rsteinthal@axinn.com](mailto:rsteinthal@axinn.com)" <[rsteinthal@axinn.com](mailto:rsteinthal@axinn.com)>, "[jhunsberger@axinn.com](mailto:jhunsberger@axinn.com)" <[jhunsberger@axinn.com](mailto:jhunsberger@axinn.com)>, "Freeborn, Andrew L." <[afreeborn@axinn.com](mailto:afreeborn@axinn.com)>

**Subject:** RE: Rescheduling Baye Deposition

Geraldine,

As discussed on Monday, I write to propose a plan for resolving the parties' dispute about whether certain rebuttal opinions offered by Plaintiffs' experts are improper rebuttal.

Google believes that at least the identified portions of the following reports are improper rebuttal:

- DeRamus Rebuttal Report Part II.B-C, Part VI.C-D, and Part VII.B
- Somayaji Rebuttal Report Part IV and Part V
- Gans Rebuttal Report ¶¶ 118-124, 130, 132, 135, 513-515; Tables 4, 5, 11-14; ¶¶ 89, 169-171, 516-517; Figures 2-4, 30-32; ¶¶ 200-202; Figure 7; ¶ 231; Figure 9; ¶¶ 236-238; Figures 10-12; ¶ 244; Figure 13; ¶¶ 318-319, 540; Figures 16 and 40; ¶¶ 346-347, 349; Figures 17-20; ¶¶ 174, 419-423, 429-432; Figure 23; Table 8

These are not the only improper rebuttals offered by Plaintiffs, and they are not the only portions of Plaintiffs' expert reports with which Google disagrees. We focus on the opinions identified above in the interest of narrowing our dispute. If Plaintiffs agree to the proposed approach described below, Google will agree not to file any motions to strike, on improper-rebuttal grounds, other than as to the DeRamus and Somayaji opinions identified above.

Google intends to move to strike the improper portions of at least the DeRamus and Somayaji reports. We propose that the parties agree that (a) Google will file a motion to strike by September 20; (b) Plaintiffs will respond by September 27; and (c) Google will reply by October 2. In addition, we propose that the parties agree to request that Judge Jordan decide the motion to strike in the first instance, as this will avoid delays from any potential appeal of a ruling by the Special Master.

To narrow the issues presented in a motion to strike, while still addressing the issues with the Gans rebuttal opinions identified above, Google would be willing to agree that: (a) Google may serve a Baye sur-rebuttal report addressing some or all of the Gans rebuttal opinions identified above on or before October 14; (b) Plaintiffs will take Baye's deposition on October 25, October 31, or November 1; and (c) Google will take Gans' deposition on October 18 or October 21.

We are attaching a draft Joint Motion to Establish Deadlines (and proposed order) that would implement the proposals described above.

On our call on Monday, you also asked us to describe how our proposals would affect deposition scheduling. As noted above, we have proposed new dates for the Baye and Gans depositions. In addition, we propose that the Wiggins deposition be moved to October 30 or 31. These adjustments to the deposition schedule for 3 of the 19 experts would provide time for the Court to evaluate the Motion to Strike, while still allowing the parties to complete all depositions before November 1 if the motion is denied. Depending on when and how the Court resolves the motion, we may need to revisit the deposition dates for any impacted experts.

We look forward to hearing your reaction. In the interests of reaching an agreement as quickly as possible, we are available at 1:30 pm ET on Thursday if you would like to meet and confer about our proposal.

Kind regards,  
Rob

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**From:** Michael Davis <[MDavis@gibbsbruns.com](mailto:MDavis@gibbsbruns.com)>

**Sent:** Monday, September 16, 2024 6:01 PM

**To:** [geraldine.young@nortonrosefulbright.com](mailto:geraldine.young@nortonrosefulbright.com)

**Cc:** MCCALLUM, Robert <[rob.mccallum@freshfields.com](mailto:rob.mccallum@freshfields.com)>; zeke.derose@lanierlawfirm.com; [mark.lanier@lanierlawfirm.com](mailto:mark.lanier@lanierlawfirm.com); [ack@kellerpostman.com](mailto:ack@kellerpostman.com); [marc.collier@nortonrosefulbright.com](mailto:marc.collier@nortonrosefulbright.com); MAHR, Eric (EJM) <[Eric.MAHR@freshfields.com](mailto:Eric.MAHR@freshfields.com)>; SESSIONS, Justina (JKS) <[Justina.Sessions@freshfields.com](mailto:Justina.Sessions@freshfields.com)>; EWALT, Andrew (AJE) <[Andrew.Ewalt@freshfields.com](mailto:Andrew.Ewalt@freshfields.com)>; RYBNICEK, Jan (JRYB) <[Jan.RYBNICEK@freshfields.com](mailto:Jan.RYBNICEK@freshfields.com)>; ELMER, Julie (JSE) <[Julie.Elmer@freshfields.com](mailto:Julie.Elmer@freshfields.com)>; KLEIN, Gayle (GRK) <[Gayle.Klein@freshfields.com](mailto:Gayle.Klein@freshfields.com)>; GARRETT, Tyler <[Tyler.Garrett@freshfields.com](mailto:Tyler.Garrett@freshfields.com)>; BOSCO, Veronica <[Veronica.Bosco@freshfields.com](mailto:Veronica.Bosco@freshfields.com)>; SONG, Tinny <[Tinny.Song@freshfields.com](mailto:Tinny.Song@freshfields.com)>; Kathy Patrick <[kpatrick@gibbsbruns.com](mailto:kpatrick@gibbsbruns.com)>; Charles M. Rosson <[CRosson@gibbsbruns.com](mailto:CRosson@gibbsbruns.com)>; Robin C. Gibbs <[RGibbs@gibbsbruns.com](mailto:RGibbs@gibbsbruns.com)>; Ann Lebeck <[alebeck@gibbsbruns.com](mailto:alebeck@gibbsbruns.com)>; Caitlin Halpern <[chalpern@gibbsbruns.com](mailto:chalpern@gibbsbruns.com)>; Michael Doman <[mdoman@gibbsbruns.com](mailto:mdoman@gibbsbruns.com)>; Daniel Bitton <[dbitton@axinn.com](mailto:dbitton@axinn.com)>; Bradley Justus <[bjustus@axinn.com](mailto:bjustus@axinn.com)>; [dpearl@axinn.com](mailto:dpearl@axinn.com); [rsteinthal@axinn.com](mailto:rsteinthal@axinn.com); [jhunsberger@axinn.com](mailto:jhunsberger@axinn.com); Freeborn, Andrew L. <[afreeborn@axinn.com](mailto:afreeborn@axinn.com)>

**Subject:** RE: Rescheduling Baye Deposition

Geraldine: Thanks again for speaking with us this afternoon. We just touched base with other elements of our team, and plan to get you the more precise list you asked for on Wednesday. Whenever you get a moment, if you'd please send something confirming that Prof. Baye's depo is postponed, that would be great. Thanks!

Michael Davis  
Gibbs & Bruns LLP

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**From:** Geraldine W. Young <[geraldine.young@nortonrosefulbright.com](mailto:geraldine.young@nortonrosefulbright.com)>

**Sent:** Monday, September 16, 2024 12:20 PM

**To:** rob.mccallum <[rob.mccallum@freshfields.com](mailto:rob.mccallum@freshfields.com)>; Zeke DeRose III  
<[zeke.derose@lanierlawfirm.com](mailto:zeke.derose@lanierlawfirm.com)>

**Cc:** Mark Lanier <[Mark.Lanier@LanierLawFirm.com](mailto:Mark.Lanier@LanierLawFirm.com)>; ack <[ack@kellerpostman.com](mailto:ack@kellerpostman.com)>;  
Marc B. Collier <[marc.collier@nortonrosefulbright.com](mailto:marc.collier@nortonrosefulbright.com)>; Eric.MAHR  
<[Eric.MAHR@freshfields.com](mailto:Eric.MAHR@freshfields.com)>; Justina.Sessions <[Justina.Sessions@freshfields.com](mailto:Justina.Sessions@freshfields.com)>;  
Andrew.Ewalt <[Andrew.Ewalt@freshfields.com](mailto:Andrew.Ewalt@freshfields.com)>; RYBNICEK, Jan (JRYB)  
<[Jan.RYBNICEK@freshfields.com](mailto:Jan.RYBNICEK@freshfields.com)>; Julie.Elmer <[Julie.Elmer@freshfields.com](mailto:Julie.Elmer@freshfields.com)>;  
gayle.klein <[gayle.klein@freshfields.com](mailto:gayle.klein@freshfields.com)>; GARRETT, Tyler  
<[Tyler.Garrett@freshfields.com](mailto:Tyler.Garrett@freshfields.com)>; BOSCO, Veronica  
<[Veronica.Bosco@freshfields.com](mailto:Veronica.Bosco@freshfields.com)>; SONG, Tinny <[tinny.song@freshfields.com](mailto:tinny.song@freshfields.com)>; Kathy  
Patrick <[kpatrick@gibbsbruns.com](mailto:kpatrick@gibbsbruns.com)>; Charles M. Rosson <[CRosson@gibbsbruns.com](mailto:CRosson@gibbsbruns.com)>;  
Ann Lebeck <[alebeck@gibbsbruns.com](mailto:alebeck@gibbsbruns.com)>; Caitlin Halpern <[chalpern@gibbsbruns.com](mailto:chalpern@gibbsbruns.com)>;  
dbitton <[dbitton@axinn.com](mailto:dbitton@axinn.com)>; bjustus <[bjustus@axinn.com](mailto:bjustus@axinn.com)>; dpearl  
<[dpearl@axinn.com](mailto:dpearl@axinn.com)>; rsteinthal <[rsteinthal@axinn.com](mailto:rsteinthal@axinn.com)>; Hunsberger, James K.  
<[jhunsberger@axinn.com](mailto:jhunsberger@axinn.com)>; Freeborn, Andrew L. <[afreeborn@axinn.com](mailto:afreeborn@axinn.com)>

**Subject:** RE: Rescheduling Baye Deposition

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Rob,

We can meet and confer with you on these issues today, at 4 pm CT. Please be prepared to address: (1) specifically, what “wholly new affirmative opinions” you claim are in Plaintiffs’ rebuttal reports and (2) whether Google is asking to move the deposition date and expects to issue a “sur-rebuttal report” for any other expert witness – and if so, when, in addition to Baye.

Thanks, Geraldine

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**From:** MCCALLUM, Robert <[rob.mccallum@freshfields.com](mailto:rob.mccallum@freshfields.com)>

**Sent:** Monday, September 16, 2024 9:01 AM

**To:** Zeke DeRose III <[zeke.derose@lanierlawfirm.com](mailto:zeke.derose@lanierlawfirm.com)>; Geraldine W. Young  
<[geraldine.young@nortonrosefulbright.com](mailto:geraldine.young@nortonrosefulbright.com)>

**Cc:** Mark Lanier <[Mark.Lanier@LanierLawFirm.com](mailto:Mark.Lanier@LanierLawFirm.com)>; ack <[ack@kellerpostman.com](mailto:ack@kellerpostman.com)>;  
Marc B. Collier <[marc.collier@nortonrosefulbright.com](mailto:marc.collier@nortonrosefulbright.com)>; Eric.MAHR  
<[Eric.MAHR@freshfields.com](mailto:Eric.MAHR@freshfields.com)>; Justina.Sessions <[Justina.Sessions@freshfields.com](mailto:Justina.Sessions@freshfields.com)>;  
Andrew.Ewalt <[Andrew.Ewalt@freshfields.com](mailto:Andrew.Ewalt@freshfields.com)>; RYBNICEK, Jan (JRYB)  
<[Jan.RYBNICEK@freshfields.com](mailto:Jan.RYBNICEK@freshfields.com)>; Julie.Elmer <[Julie.Elmer@freshfields.com](mailto:Julie.Elmer@freshfields.com)>;  
gayle.klein <[gayle.klein@freshfields.com](mailto:gayle.klein@freshfields.com)>; GARRETT, Tyler  
<[Tyler.Garrett@freshfields.com](mailto:Tyler.Garrett@freshfields.com)>; BOSCO, Veronica  
<[Veronica.Bosco@freshfields.com](mailto:Veronica.Bosco@freshfields.com)>; SONG, Tinny <[tinny.song@freshfields.com](mailto:tinny.song@freshfields.com)>; Kathy  
Patrick <[kpatrick@gibbsbruns.com](mailto:kpatrick@gibbsbruns.com)>; Charles M. Rosson <[CRosson@gibbsbruns.com](mailto:CRosson@gibbsbruns.com)>;  
Ann Lebeck <[alebeck@gibbsbruns.com](mailto:alebeck@gibbsbruns.com)>; Caitlin Halpern <[chalpern@gibbsbruns.com](mailto:chalpern@gibbsbruns.com)>;

dbitton <[dbitton@axinn.com](mailto:dbitton@axinn.com)>; bjustus <[bjustus@axinn.com](mailto:bjustus@axinn.com)>; dpearl <[dpearl@axinn.com](mailto:dpearl@axinn.com)>; rsteinthal <[rsteinthal@axinn.com](mailto:rsteinthal@axinn.com)>; Hunsberger, James K. <[jhunsberger@axinn.com](mailto:jhunsberger@axinn.com)>; Freeborn, Andrew L. <[afreeborn@axinn.com](mailto:afreeborn@axinn.com)>

**Subject:** Rescheduling Baye Deposition

**[External Email – Use Caution]**

Zeke and Geraldine,

Google has been reviewing and evaluating Plaintiffs' eleven rebuttal expert reports (which total nearly 1500 pages) since receiving them late at night on Monday, September 9. Based on that initial (and ongoing) review, portions of those reports tender wholly new *affirmative* opinions on issues where Plaintiffs bear the burden of proof. New arguments and analyses that do not respond to Google's expert reports are not rebuttal: they are untimely affirmative opinions. See, e.g., Fed. R. Civ. P. 26(a)(2)(D)(ii); *United States v. 9.345 Acres of Land*, 2016 WL 5723665 at \*3 (M.D. La. Sept. 30, 2016) ("Rule 26 defines a proper expert rebuttal report as one that is 'intended solely to contradict or rebut evidence on the same subject matter identified' by the opposing party's case in chief expert report. **A witness whose purpose is to contradict an expected and anticipated portion of the opposing party's case in chief can never be considered a rebuttal witness**; a rebuttal witness must respond to new opinions brought out in her opponent's case in chief.") (emphasis added and citing *Morgan v. Commercial Union Assurance Companies*, 606 F.2d 554, 555-56 (5th Cir. 1979)).

Each of these new affirmative opinions rests on information available to your experts *before* they tendered their opening reports, confirming that they are not rebuttal reports at all but, instead, are untimely affirmative analyses that should have been disclosed in Plaintiffs' opening reports. See, e.g., *Pace v. State Farm Fire & Cas. Co.*, 2024 WL 409398, at \*4-5 (S.D. Miss. Feb. 2, 2024) (report was improper rebuttal because it addressed "an essential element of Plaintiff's claim" and did "not address new information"). Because they are not proper rebuttal opinions, Google reserves its right to move to strike these new opinions as well as its right, if these reports are not stricken, to seek leave to serve one or more sur-rebuttal reports.

This dilemma—which is of Plaintiffs' making—raises another issue. Before receiving Plaintiffs' rebuttal reports, Google agreed to make Professor Michael Baye available for deposition on Thursday, September 19. Plaintiffs' service of untimely affirmative reports has prejudiced Google, threatening to deprive it of the right to have its own experts respond—in full—to all of Plaintiffs' affirmative opinions. Accordingly, Professor Baye intends to review and respond to them in a surreply report—a report Google without doubt has a right to ask him to provide. See *9.345 Acres of Land*, 2016 WL 5723665 at \*6 (prejudice caused by improper rebuttal report, if not stricken, may in some circumstances be cured by allowing a surreply report).

Accordingly, we write to advise you that Professor Baye's deposition needs to be rescheduled. While Professor Baye is evaluating Plaintiffs' "rebuttal" reports as quickly as possible, the number, length, and novelty of the new arguments in those reports means that Professor Baye cannot complete his surreply report and provide it to you before September 19, the date currently scheduled for his deposition.

We expect that any sur-rebuttal report from Professor Baye would be completed before October 24, and he would be available to be deposed in Bloomington, Indiana on October 24, October 25, October 31, or November 1.

Please let us know as soon as possible whether Plaintiffs will consent to reschedule Professor Baye's deposition. We are also available to meet and confer promptly to discuss this issue, as well as the broader issue presented by Plaintiffs' untimely tender of affirmative reports in the guise of "rebuttal" reports.

Kind regards,  
Rob

**Rob McCallum**  
Of Counsel

**Freshfields Bruckhaus Deringer US LLP**

3 World Trade Center  
175 Greenwich Street  
New York, NY 10007  
T +1 212 284 4910  
[freshfields.com](https://www.freshfields.com)

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